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Nos. 02-1574 and 02-1624

Supreme Court, U.S.
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In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL A. NEWDOW, ET AL.,

Respondents.

ELK GROVE UNIFIED SCHOOL DISTRICT
and DAVID GORDON, Superintendent, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND, ALABAMA ASSOCIATION OF SCHOOL BOARDS, ARIZONA SCHOOL BOARDS ASSOCIATION, ARKANSAS SCHOOL BOARDS ASSOCIATION, IDAHO SCHOOL BOARDS ASSOCIATION, KENTUCKY SCHOOL BOARDS ASSOCIATION, LOUISIANA SCHOOL BOARDS ASSOCIATION, MISSOURI SCHOOL BOARDS ASSOCIATION, NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, AND OHIO SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici are nonprofit associations of public school boards dedicated to the support and improvement of the public schools and the enhancement of student achievement. Collectively, Amici represent more than 2,300 public school boards that are directly responsible for the education of more than six million students.

Texas Association of School Boards Legal Assistance Fund. Nearly 800 Texas public school districts are members of the Texas Association of School Boards Legal Assistance Fund. The Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards, the Texas Association of School Administrators, and the Texas Council of School Attorneys. The Texas Association of School Boards is a nonprofit, unincorporated association of the public school districts of the State of Texas. Approximately 1,045 public school districts, through their elected boards of trustees, are TASB members. TASB assists school boards by providing leadership, educational materials, technical services, and legislative and policy services. The Texas Association of School Administrators represents the state's school superintendents and other administrators responsible for carrying out the education policies adopted by their local boards of trustees. Texas' Council of School Attorneys is composed of

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[1] The parties' written consent to the filing of this brief has been filed with the Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the amici curiae and their counsel made any monetary contribution to the preparation or submission of this brief.

attorneys who represent more than 90 percent of the school districts in Texas.

Alabama Association of School Boards. The Alabama Association of School Boards represents the interests of Alabama's city and county boards of education. The AASB was established in 1949 as a voluntary membership organization. In 1955, the Legislature recognized the AASB as "the organization and representative agency of the members of the school boards of Alabama." Ala. Code § 16-1-6 (1975). Although the AASB is a voluntary membership organization, every local public school board in the State is an AASB member. In fulfilling its purpose, the AASB promotes and supports the interests of its member boards of education on a variety of legal and educational issues.

Arizona School Boards Association. The Arizona School Boards Association is a nonprofit, nonpartisan organization representing more than 225 public school districts. The organization provides numerous resources for local governing boards, including ongoing training and educational materials for the promotion of student achievement. Its vision for students includes conveying to students the importance of fulfilling one's potential, contributing to the community, participating in the democratic process, and continuing to learn throughout life.

Arkansas School Boards Association. The Arkansas School Boards Association is a nonprofit organization whose members include more than 300 local school boards. ASBA believes that a program of public education is not something that just happens but, rather, is something that must be planned, financed, and administered by school board members, administrators, and educators dedicated to the goal of student achievement. The ASBA serves its

members through educational programs, training, and policy development.

Idaho School Boards Association. The membership of the Idaho School Boards Association, Inc., consists of school board trustees elected throughout the state of Idaho. ISBA is dedicated to the advancement of education through the promotion of public understanding of the role of local school boards and school board members. In addition, ISBA endeavors to work for adequate and equitable financing of public schools and to study, interpret, propose and influence legislation that may affect education in the state of Idaho.

Kentucky School Boards Association. The Kentucky School Boards Association provides advocacy, consultation, information, professional development, and district support services to school board members as well as district and school staff. KSBA is a nonprofit service organization composed of almost 900 members of local boards of education. KSBA's strategic objectives include ensuring that every board will govern effectively and with integrity and that every board member will understand and emphasize student achievement.

Louisiana School Boards Association. The Louisiana School Boards Association is a nonprofit, unincorporated association of all the public school systems in Louisiana. The mission of the LSBA is to provide technical assistance to the state's school boards so that they may provide a high quality education to the state's school children.

Missouri School Boards Association. The Missouri School Boards Association is a statewide, nonprofit organization representing local school boards who are charged

with shaping the educational programs of the public school students of Missouri. The MSBA's mission is to assist school boards and enhance student achievement by providing leadership, training, educational materials, and technical services.

North Carolina School Boards Association. The North Carolina School Boards Association is a voluntary membership organization representing all 117 local boards of education in the State of North Carolina. Many of NCSBA's members regularly require students to recite the Pledge of Allegiance. All NCSBA's members have a strong interest in having a definitive Supreme Court ruling on the constitutionality of the Pledge in its current form so that they can avoid potential litigation in the event they choose to have students recite it.

Ohio School Boards Association. The Ohio School Boards Association is a statewide nonprofit organization of public school boards. Membership in OSBA is open to all public school boards, and 100 percent of the board members in the various city, exempted village, local, and joint vocational school districts throughout the State of Ohio (662 in all) are currently members of OSBA, as are all of the governing boards of Ohio's 60 educational service centers. The mission of OSBA is to unite boards of education and to provide information, services, and representation to its members.

SUMMARY OF ARGUMENT

The nation's public schools need this Court's guidance regarding the constitutionality of the recitation of the

Pledge of Allegiance in public schools. Although inapplicable to schools outside the Ninth Circuit, the *Newdow* decision has cast a long shadow of uncertainty in circuits without controlling authority regarding recitation of the Pledge. These school districts face a real dilemma: do they follow their state's laws regarding voluntary recitation of the Pledge or do they run the risk of being sued for allowing the Pledge? The dilemma is more than theoretical. After the original *Newdow* ruling, yet another lawsuit was filed regarding recitation of the Pledge, and an appeal is now pending in the Fourth Circuit. Because of public interest in this matter, future litigation on this issue, circuit by circuit, is virtually assured. Guidance from this Court is needed to end the debate (and litigation) regarding the Pledge.

The *Newdow* decision also is worthy of this Court's review because it intrudes upon the public schools' historically honored role in setting curriculum and invites further litigation over classroom use of historical materials that refer to religion. State curriculum models from states as varied as California, Kentucky, and Pennsylvania show that the Pledge of Allegiance is part of a larger program of civics education and is used as a tool to lay a foundation for later, more complex learning about citizenship, equality, freedom, and responsibility. The court of appeals erred in isolating the Pledge from the larger academic context in which the Pledge is used.

The court of appeals apparently attempted to narrow the effect of its ruling by stating that the Pledge is a "performative" statement that requires students to affirm a belief. To the extent that the court of appeals' argument rests on a particular student being forced to recite the Pledge, the argument is without weight because no

student is required to recite the Pledge. The argument seems to rest on a belief that hearing *other* students recite a performative statement has an effect that hearing those same students recite, for example, the words "We hold these truths to be self-evident" does not. The study of historical documents involves more than a passive review of the past, but, rather, involves active learning and the inculcation of the values contained in the documents. Inspirational documents such as the Declaration of Independence may not be "performative" as a grammatical matter, but it is unclear why the court of appeals assumed that their recitation would have less effect on students than the recitation of the Pledge.

Granting review in this case, and reversing the Ninth Circuit, will not require this Court to tread into uncharted territory or to revisit the school prayer cases. It will merely reaffirm the right of public schools to instill patriotic virtue and to teach civics in a manner that accurately reflects the heritage of the United States, without fear of constant challenges in the courts.

ARGUMENT

I. The nation's public schools need this Court's guidance regarding the constitutionality of the recitation of the Pledge of Allegiance.

A majority of states maintain statutes that either require or encourage schools to have regular recitations of

the Pledge of Allegiance.[2] Ten of these states are located in circuits where the federal courts have ruled on the constitutionality of the Pledge. Although inapplicable to schools outside the Ninth Circuit, the *Newdow* decision has cast a long shadow of uncertainty in circuits without controlling authority regarding recitation of the Pledge. Schools in these states face a dilemma: do they ignore the instructions of their state legislatures or do they run the risk of being sued for permitting the recitation of the Pledge of Allegiance? Even in states where the recital of the Pledge is optional rather than a statutory mandate, educators

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[2] ALA. CODE § 16-43-5 (2003); ALASKA STAT. § 14.03.130 (Michie 2003); ARIZ. REV. STAT. § 15-506 (2003); CAL. EDUC. CODE § 52720 (Deering 2003); CONN. GEN. STAT. ANN. § 10-230 (West 2002); DEL. CODE ANN. tit. 14, § 4105 (2002); FLA. STAT. ANN. § 1003.44 (West Supp. 2003); GA. CODE ANN. § 20-2-310 (2003); IDAHO CODE § 33-1602 (Michie 2002); 105 ILL. COMP. STAT. ANN. § 5/27-3 (West 2003); KAN. STAT. ANN. § 72-5308 (2002); KY. REV. STAT. ANN. § 158.175 (Banks-Baldwin 2003); LA. REV. STAT. ANN. § 17:2115 (West 2001); MD. CODE ANN., EDUC. § 7-105 (2002); MASS. GEN. LAWS ANN. ch. 71, § 69 (West Supp. 2003); MISS. CODE ANN. § 37-13-6 (Supp. 2002); MO. REV. STAT. § 171.021 (2003); MONT. CODE ANN. § 20-7-133 (2002); NEV. REV. STAT. ANN. 389.040 (Michie 2003); N.H. REV. STAT. ANN. § 194:15-c (2003); N.J. STAT. ANN. § 18A:36-3 (West 2003); N.M. STAT. ANN. § 22-5-4.5 (Michie 2002); N.Y. EDUC. LAW § 802 (McKinney 2000); N.C. GEN. STAT. § 115C-47 (2002); N.D. CENT. CODE § 15.1-19-03.1 (2001); OKLA. STAT. ANN. tit. 70, § 24-106 (West Supp. 2003); OR. REV. STAT. § 339.875 (2001); 24 PA. CONS. STAT. ANN. § 7-771 (West Supp. 2003); R.I. GEN. LAWS § 16-22-11 (2002); S.C. CODE ANN. § 59-1-455 (Law. Co-op. 2002); TENN. CODE ANN. § 49-6-1001 (2003); UTAH CODE ANN. § 53A-13-101.6 (2003); VA. CODE ANN. § 22.1-202 (Michie 2003); WASH. REV. CODE ANN. § 28A.230.140 (West 2003); W. VA. CODE ANN. § 18-5-15b (Michie 2003); WIS. STAT. § 118.06 (2002).

On May 28, 2003, Texas joined these states when its governor signed a bill requiring that the pledge be recited in public schools beginning September 1, 2003. *See* S.B. 83, 78th Reg. Sess. (Tex. 2003) (amending Section 25.082 of the Texas Education Code).

now must question whether voluntary recital of the Pledge is a constitutional choice for their schools.

The dilemma is more than theoretical. After the first ruling in *Newdow*, a school district in Virginia was sued over its requirement that the pledge be recited daily, and an appeal is now pending in the Fourth Circuit.[3] Given the regularity with which public schools are sued over matters touching on religion, future litigation on this particular issue, circuit by circuit, is virtually assured.[4] Any school located within a circuit that has not yet ruled on the matter will be without guidance until litigation is brought in its circuit. The cost of First Amendment litigation to the public schools, at least with respect to attorneys' fees, can be enormous.[5] Guidance from this Court is needed to end the debate (and litigation) regarding the Pledge and to provide assurance to the nation's schools that their authority in matters of pedagogy remains intact.

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[3] *Myers v. Loudoun County Sch. Bd.*, 251 F. Supp. 2d 1262 (E.D. Va. 2003). Although the plaintiffs in *Myers* pressed a somewhat different argument than that pressed by Mr. Newdow in the case below, the case was based on a claim that recitations of the pledge violated the Establishment Clause.

[4] This Court's decisions regarding vouchers, student prayer, and school aid, and its decision to review a religious studies funding case, are but a few recent examples of First Amendment litigation directly impacting the schools. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (vouchers); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student prayer); *Mitchell v. Helms*, 530 U.S. 793 (2000) (school aid); *Locke v. Davey*, 299 F.3d 748 (9th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3721 (U.S. May 19, 2003) (funding for religious studies).

[5] *See, e.g.*, *Santa Fe District to Pay Lawyers in School Prayer Case $250,000*, HOUS. CHRON., May 10, 2001, at A46 (discussing award of fees to prevailing plaintiff in prayer case).

II. The Pledge of Allegiance is a historically accurate acknowledgement of history, values, and patriotism and is properly part of a secular social studies program.

A. State curriculum models show that the Pledge of Allegiance is used as a tool for introducing basic concepts of citizenship and democratic values to students.

The Pledge of Allegiance serves two interrelated functions in our system of education: ceremonial and pedagogical. The ceremonial function serves the secular purpose of "expressing confidence in the future and encouraging recognition of what is worthy of appreciation in society." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring) (internal quotation marks omitted). Although "the symbolic and cultural side of schools is too often viewed as 'soft' or as a superficial afterthought," learning is fostered in large part "by strong traditions, frequent ritual, and poignant ceremonies to reinvigorate cultural cohesion and focus." TERENCE E. DEAL & KENT D. PETERSON, SHAPING SCHOOL CULTURE: THE HEART OF LEADERSHIP 10, 32 (Jossey-Bass 1999); *see also* THOMAS SERGIOVANNI, MORAL LEADERSHIP: GETTING TO THE HEART OF SCHOOL IMPROVEMENT 99 (Jossey-Bass 1992) (noting general research establishing link between school effectiveness and school culture). Classrooms contain children of enormous diversity in language, culture, family background, and readiness for learning. More than just a throwaway moment after the ringing of the morning bell, the Pledge of Allegiance represents an opportunity for a classroom of children to reflect on a common purpose and national identity.

The Pledge also serves as an important tool for introducing basic concepts of citizenship to children. The founders viewed education of children and inculcation of democratic values as essential to the survival of the nation.[6] This Court, time and again, has recognized that the fundamental purpose of the public schools is to prepare children for their role in society. *See, e.g.*, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) ("[P]ublic education must prepare pupils for citizenship in the Republic. . . ."); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (confirming the authority of the state to require that children attend school, either public or private, and to require that teachers be "of good moral character and patriotic disposition"). For example, in *Ambach v. Norwick*, 441 U.S. 68 (1979), in which the Court upheld a state statute forbidding certification of teachers unless they were citizens or had agreed to apply for citizenship, the Court again acknowledged the importance of public schools "in the preparation of individuals for

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[6] *See generally* LORRAINE PANGLE & THOMAS PANGLE, THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS 75, 93, 96, 106-117, 125, 144, 194 (University Press of Kansas 1993) (summarizing perspectives on education espoused by Franklin, Jefferson, Adams, Rush, Webster, and others); WALTER BERNS, MAKING PATRIOTS 65 (University of Chicago Press 2001) ("Inculcation of love of country, like moral education generally, takes place" at an early age, which is why Jefferson proposed that the young be educated at public expense; education would render them " 'worthy to receive, and able to guard the sacred deposit of the rights and liberties of their fellow citizens' "); DORIANE LAMBELET COLEMAN, FIXING COLUMBINE: THE CHALLENGE TO AMERICAN LIBERALISM 147-50 (Carolina Academic Press 2002) (explaining that Franklin, Rush, Jefferson and others argued that the success of the democratic experiment rested on some version of a universal system of public education that would emphasize knowledge and virtue).

participation as citizens, and in the preservation of the values on which our society rests." *Id.* at 76. Education is "perhaps the most important function" of local government and provides the "very foundation of good citizenship" and of awakening children to cultural values. *Id.* at 76-77 (citing *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).

Children, of course, do not show up on the first day of kindergarten ready to absorb John Locke's theory of natural rights. The classic curriculum model is one that introduces age-appropriate information and concepts and builds upon them year after year. *See generally* PETER SENGE ET AL., SCHOOLS THAT LEARN 154-65 (Doubleday 2000) (reviewing literature regarding the cognitive development of children and explaining how children in the lower primary grades transition from thinking about their families and friends to thinking about their communities and the world around them).

The state-approved curricula for states as varied as California, Kentucky, New York, Pennsylvania, and Texas show that concepts such as citizenship and freedom are introduced to elementary-age children through the study and recognition of symbols, customs, landmarks, songs, and celebrations.[7] In these states and elsewhere, the

[7] *See* CALIFORNIA BOARD OF EDUCATION, HISTORY-SOCIAL SCIENCE CONTENT STANDARDS FOR CALIFORNIA PUBLIC SCHOOLS: KINDERGARTEN THROUGH GRADE TWELVE 3, 6, 10 (1998) *available at* http://www.cde.ca.gov/cdepress/Hist_SocSci_Stnd.pdf; KENTUCKY DEPARTMENT OF EDUCATION, CORE CONTENT FOR SOCIAL STUDIES ASSESSMENT, Standard SS-E-5.2.5 (1999) *available at* http://www.kde.state.ky.us/KDE/Instructional+Resources/Curriculum+Documents+and+Resources/Core+Content+for+Assessment.htm; NEW YORK DEPARTMENT OF EDUCATION, LEARNING STANDARDS FOR SOCIAL STUDIES 25-26, Standard 5

(Continued on following page)

Pledge of Allegiance is part of a larger program designed to teach history and government.[8] It is used to lay a foundation for later, more complex learning about the ideas contained within the Pledge. As their critical thinking skills grow, students examine the political, religious, and economic ideas and interests that brought about the American Revolution, and they study in detail the concepts in the Declaration of Independence and Constitution,

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(1996) *available at http://www.emsc.nysed.gov/ciai/socst/pub/sslearn.pdf*; PENNSYLVANIA DEPARTMENT OF EDUCATION, ACADEMIC STANDARDS FOR HISTORY, 22 PA. CODE, Chapter 4, Appendix C, Standards 5.1.3(G) and (K) (1999); TEXAS EDUCATION AGENCY, TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR SOCIAL STUDIES, 19 TEX. ADMIN. CODE § 113.2(b)(10), § 113.3 (b)(13) (West 2003).

[8] *See, e.g.*, CALIFORNIA CONTENT STANDARDS, *supra* note 7, 6 (stating that students will learn about the Pledge and other symbols and traditions "that provide continuity and a sense of community across time"); KENTUCKY CORE CONTENT FOR SOCIAL STUDIES ASSESSMENT, *supra* note 7, Standards SS-E-5.2.2 and 5.2.5 (stating that students will learn about symbols, "patriotic songs, poems (*e.g.*, Pledge of Allegiance)" and will learn about "ideals of equality and personal liberty"); NEW YORK LEARNING STANDARDS FOR SOCIAL STUDIES, *supra* note 7, at 25-26, Standard 5 (stating that students will learn "basic principles" of the Declaration of Independence and Constitution and indicating that these objectives will have been realized when, for example, students "understand the significance" of the Pledge); PENNSYLVANIA ACADEMIC STANDARDS FOR HISTORY, *supra* note 7, Standards 5.1.3(G), (J), and (K) (stating that students will learn to "[d]escribe the purpose" of the flag, Pledge of Allegiance, and national anthem as well as learn "the importance of respect for" the "opinions of others"); TEXAS ESSENTIAL KNOWLEDGE AND SKILLS FOR SOCIAL STUDIES, *supra* note 7, § 113.3(b)(12), (13) (stating that students will learn how symbols and customs "contribute to our national identity," explain the meaning of the Pledge of Allegiance, and explain how selected symbols and customs "reflect an American love of individualism, inventiveness, and freedom.").

including the valuable role of freedom of conscience and the protection of minority viewpoints.[9]

The Pledge of Allegiance is a historically accurate acknowledgement of history, values, and patriotism. It is properly part of a larger program of citizenship training. The court of appeals' decision ignores these important secular goals, undercuts the authority of educators in developing social studies curricula, and sets the stage for further litigation regarding local curriculum choices.

B. The decision below intrudes upon the public schools' historically honored role in setting curriculum, and it invites litigation over school activities and classroom lessons that refer to the role of religion in American history.

Numerous states have determined that the Pledge of Allegiance is a useful component of teaching students civics and American history as well as a ritual that enhances school culture. So long as constitutional restrictions are honored, it "is not the business of this Court to gainsay the judgments of experts on matters of pedagogy." *School District of Abington Township v. Schempp*, 374 U.S. 203, 279 (1963) (Brennan, J., concurring). Mr. Newdow's challenge is only one in a long line of challenges brought by parents to schools' curricular choices. Although these

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[9] *See, e.g.*, CALIFORNIA CONTENT STANDARDS, *supra* note 7, at 5, 6, 16, 18, 33, 34; NEW YORK LEARNING STANDARDS, *supra* note 7, 25-29, Standard 5; TEXAS ESSENTIAL KNOWLEDGE AND SKILLS, *supra* note 7, § 113.7(b)(2)-(3) & (15)-(21), § 113.24(b)(2)-(4), (16)-(26), § 113.35(b)(14)-(17).

challenges are seldom successful, litigation has been steady during the past two decades, with challenges to programs and teaching materials used in civic education, literature, biology, and health and sex education.[10] Courts faced with these challenges have properly recognized that schools must be free to make these choices if they are to fulfill their functions of educating students in knowledge and of instilling civic virtue.[11]

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[10] *See, e.g.*, *PLANS, Inc. v. Sacramento City Unified Sch. Dist.*, 319 F.3d 504 (9th Cir. 2003) (challenging entire educational program); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2nd Cir.), *cert. denied*, 534 U.S. 827 (2001) (challenging several activities including Earth Day celebrations and poetry from Shel Silverstein's *Where the Sidewalk Ends*); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (objecting to AIDS and sex education program); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (teacher challenging requirement that he teach evolution); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (challenging supplemental reading program for grades kindergarten through five); *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987) (challenging use of elementary and secondary school textbooks in the areas of history, social studies, and home economics); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (challenging reading textbooks for grades one through eight); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985) (challenging novel assigned in tenth grade English class); *Leebaert ex rel. Leebaert v. Harrington*, 193 F. Supp. 2d 491 (D. Conn. 2002) (challenging health education curriculum); *Grimes v. Cavazos*, 786 F. Supp. 1184 (S.D.N.Y. 1992) (challenging curriculum as "culturally biased").

Most of these challenges were based on the *lack* of religious content (*i.e.*, allegations that the school was endorsing "secular humanism") or parental disagreement with the values and ideas included in the school's curriculum. *See, e.g.*, *Fleischfresser*, 15 F.3d at 683; *Smith*, 827 F.2d at 688.

[11] *See, e.g.*, *Brown*, 68 F.3d at 534 ("If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for

(Continued on following page)

The decision below invites new challenges to schools' curricular decisions. Although it is undisputed that religion has played an important role in this nation's history,[12] and although this Court has recognized that information about religion may be "integrated into the school curriculum,"[13] many teachers now will have to think twice when deciding how best to present a wide range of historical materials that necessarily acknowledge the belief, not only of the founders but also of many of America's later leaders, that the United States was a nation "brought forth under God." In New York, for example, where students learn about the "basic ideals of American democracy" by

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each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state education systems. . . ."); *Fleischfresser*, 15 F.3d at 686 ("We are also mindful, however, that this heightened concern [about violations of the Establishment Clause in schools] is balanced to a great degree by the broad discretion of a school board to select its public school curriculum."); *see also McCollum v. Board of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring) ("If we are to eliminate everything that is objectionable to any [religious group] or inconsistent with any of their doctrines, we will leave public schools in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.").

[12] *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (stating that our nation's "institutions presuppose a Supreme Being"); *see also* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 292-93 (George Lawrence trans., HarperPerennial 1988) (observing that the early Americans viewed religion as "necessary to the maintenance of republican institutions").

[13] *Stone v. Graham*, 449 U.S. 39, 42 (1980) (citation omitted); *see also School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) ("Nothing we have said" indicates that the study of religion, "when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.").

studying both the Gettysburg Address and Martin Luther King's "I Have a Dream" speech,[14] is classroom recitation permitted as to King's words but now forbidden as to Lincoln's? The long shadow of the *Newdow* decision creates a new source of uncertainty and anxiety for classroom teachers.

The beliefs of those who founded this country necessarily suffuse their deeds and words, from the Mayflower Compact to the Declaration of Independence through the Gettysburg Address. Historical accuracy, in combination with the secular purpose of instilling patriotism, must permit public schools to acknowledge the religious heritage of the country without violating the Establishment Clause. Indeed, *not* acknowledging the role of religion would result in "a distorted impression about the place of religion in our national life." *Newdow v. U.S. Congress*, 2003 WL 21003832 *14 (9th Cir. 2003) (O'Scannlain, J., dissenting from the denial of rehearing en banc.) Yet the decision below could be read to require such a result.

C. The court of appeals' "performative" distinction does not withstand scrutiny.

The court of appeals apparently attempted to minimize the impact of its ruling by distinguishing the Pledge as a "performative" statement that requires students to affirm a belief. To the extent that the court of appeals' argument rests on a particular student being forced to recite the Pledge, it is, of course, without weight because no student is required to recite the Pledge. The argument

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[14] NEW YORK LEARNING STANDARDS, *supra* note 7, at 2.

seems to rest, therefore, on a belief that hearing *other* students recite a performative statement has an effect that hearing those same students recite, for example, the words "We hold these truths to be self-evident" does not. The court of appeals, however, did not explain the basis for this apparent conclusion.

The court contrasted the reading of the Declaration of Independence and similar works as merely passive, as if the study of historical texts were merely a dry exercise for the edification of civics teachers. As a preliminary matter, the court of appeals' suggestion that the review of documents is saved by the passivity of the exercise is simply inconsistent with prior holdings of this Court. *See, e.g., Stone v. Graham*, 449 U.S. 39, 42 (1980) (stating that the fact that copies of the Ten Commandments were "merely" posted in schools rather than read aloud was immaterial; practice was unconstitutional because the practice served no legitimate secular purpose). Even more importantly, the foundational documents of our government are not "merely" reviewed, as suggested by the court of appeals, but are taught as documents that must be understood and revered. The reading or recitation of such documents as part of classroom assignments or school programs involves both active learning and the promotion of patriotism and citizenship. Indeed, the Declaration of Independence itself was written to be read aloud. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 342 (Knopf 1996) ("Unlike the Declaration of Independence, which Jefferson (we now know) wrote to be read aloud, literally performed, the prosaic text of the Constitution was best read silently, not for inspiration, but for direction").

In short, although inspirational documents such as the Declaration of Independence and the Gettysburg Address may not be "performative" as a grammatical matter, it is unclear why the court of appeals assumed that their recitation would have less effect on students than the recitation of the Pledge. Nor is it clear why it assumed that this difference was enough to constitutionally condemn the recitation of one but not the others.

D. The court of appeals erred in isolating the Pledge from the larger academic context in which the Pledge is used.

The "practical message" of the Pledge is an appreciation of the political ideologies on which the country was founded. *Myers v. Loudoun County School Board*, 251 F. Supp. 2d 1262, 1269 (E.D. Va. 2003). In analyzing the Pledge of Allegiance, the court of appeals erred by isolating the phrase "under God" from the remainder of the Pledge, and it erred again in isolating the Pledge from the larger academic context in which the Pledge is used. The Pledge cannot be viewed in a vacuum apart from other lessons conveyed to students, lessons in which students learn about the historical conditions that led Jefferson, Madison, and others to create a government and cultural environment where people of strong belief and no belief are equal under the law.[15] They learn how America became "what no other country had ever been . . . a 'haven for all sorts and conditions of men.'. . . " WALTER BERNS, MAKING

[15] *See, e.g.*, CALIFORNIA CONTENT STANDARDS, *supra* note 7, at 16, 18, 33, 34; TEXAS ESSENTIAL KNOWLEDGE & SKILLS, *supra* note 7, § 113.7(b)(2)-(3) & (15)-(21), § 113.24(b)(16), (24), § 113.35(b)(14)-(17).

PATRIOTS 30-32 (University of Chicago Press 2001). The Pledge may play but one part in contributing to these larger curricular and patriotic objectives, but it is one that is worthy of preservation.

Against this backdrop, it is "obvious," to quote Judge Fernandez's dissent,[16] that the Pledge of Allegiance neither establishes religion nor interferes with anyone's free exercise rights. Granting review in this case, and reversing the Ninth Circuit, will not require this Court to tread into uncharted territory or to revisit the school prayer cases. It will merely reaffirm the right of public schools to instill patriotism and to teach civics in a manner that reflects the heritage of the United States, without fear of constant challenges in the courts.

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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[16] *Newdow*, 2003 WL 21003832 *24 (Fernandez, J., dissenting).